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MISSOURI PAC. R.R. v. BIDDLE
Cite as 293 Ark. 142 (1987)

148-A

Supplemental Opinion on Rehearing
October 5, 1987

737 S.W.2d 625

RAILROADS — APPELLEES DID NOT ESTABLISH NEGLIGENCE — DIRECTED VERDICT SHOULD HAVE BEEN GRANTED. — The appellant had a statutory duty to sound a bell *or* whistle, and in the absence of any testimony offered by the appellees that a bell was not sounded, the matter should not have gone to the jury; the motion for directed verdict should have been granted.

DARRELL HICKMAN, Justice. A rehearing is granted because

we made a mistake regarding the facts in our decision of July 20, 1987.

We said: "The appellee however, testified he *did not hear a bell or a whistle . . .*" (Italics supplied.) The record reflects this:

Q. Did you ever hear a *train whistle* on that day?

A. No sir. (Italics supplied.)

Appellee never testified that he did not hear a bell. The question of whether the railroad was negligent in violating Ark. Stat. Ann. § 73-716 (Repl. 1979) was submitted to the jury. The statute provides:

A bell of at least thirty [30] pounds weight, or a steam whistle, shall be placed on each locomotive or engine, and shall be rung or whistled at the distance of at least eighty [80] rods from the place where the said road shall cross any other road or street, and be kept ringing or whistling until it shall have crossed said road or street, under a penalty of two hundred dollars [\$200.00] for every neglect, to be paid by the corporation owning the railroad, one-half [$\frac{1}{2}$] thereof to go to the informer and the other half [$\frac{1}{2}$] to the county; and the corporation shall also be liable for all damages which shall be sustained by any person by reason of such neglect.

[1] The statutory duty is to sound a bell *or* whistle. In the absence of any testimony offered by the appellees that a bell was not sounded, the matter should not have gone to the jury. Compliance with the statute was the sole remaining issue of liability. Since the appellees did not establish a case of negligence,

the motion for directed verdict should have been granted.

Reversed and dismissed.

GLAZE, J., concurs.

HAYS, J., would deny.
